

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 10, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERESA M.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:19-CV-00348-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 11, 12. Attorney David Lybbert represents Teresa M. (Plaintiff); Special Assistant United States Attorney Danielle Mroczek represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on February 1, 2016, alleging disability since December 22, 2013 due to depression, anxiety, fibromyalgia, high blood pressure, arthritis, and back problems. Tr. 247. The applications were denied initially and

1 upon reconsideration. Tr. 286-93, 296-315. Administrative Law Judge (ALJ) Eric
2 Basse held a hearing on September 22, 2017, Tr. 193-243, and issued an
3 unfavorable decision on September 6, 2018. Tr. Tr. 17-27. Plaintiff requested
4 review by the Appeals Council and the Appeals Council denied the request for
5 review on August 15, 2019. Tr. 1-6. The ALJ's September 2018 decision became
6 the final decision of the Commissioner, which is appealable to the district court
7 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
8 October 16, 2019. ECF No. 1.

9 **STATEMENT OF FACTS**

10 Plaintiff was born in 1973 and was 40 years old as of her alleged onset date.
11 Tr. 26. She has a high school education and some college coursework. Tr. 197,
12 476. Her work history was primarily in childcare and security. Tr. 223-30. She
13 stopped working in 2013 due to health issues. Tr. 198-99. At her hearing she
14 testified that she is unable to work due to pain, fatigue, and panic attacks. Tr. 200-
15 01, 213, 216, 230-31.

16 **STANDARD OF REVIEW**

17 The ALJ is responsible for determining credibility, resolving conflicts in
18 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
19 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
20 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
21 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
22 only if it is not supported by substantial evidence or if it is based on legal error.
23 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
24 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
25 1098. Put another way, substantial evidence is such relevant evidence as a
26 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
27 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
28 rational interpretation, the Court may not substitute its judgment for that of the

1 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
 2 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
 3 administrative findings, or if conflicting evidence supports a finding of either
 4 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
 5 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
 6 supported by substantial evidence will be set aside if the proper legal standards
 7 were not applied in weighing the evidence and making the decision. *Browner v.*
 8 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

9 SEQUENTIAL EVALUATION PROCESS

10 The Commissioner has established a five-step sequential evaluation process
 11 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 12 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
 13 four, the burden of proof rests upon the claimant to establish a prima facie case of
 14 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
 15 met once a claimant establishes that a physical or mental impairment prevents the
 16 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
 17 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
 18 to step five, and the burden shifts to the Commissioner to show (1) the claimant
 19 can make an adjustment to other work; and (2) the claimant can perform specific
 20 jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359
 21 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment to
 22 other work in the national economy, the claimant will be found disabled. 20 C.F.R.
 23 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

24 ADMINISTRATIVE DECISION

25 On September 6, 2018, the ALJ issued a decision finding Plaintiff was not
 26 disabled as defined in the Social Security Act.

27 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 28 activity since the alleged onset date. Tr. 19.

1 At step two, the ALJ determined Plaintiff had the following severe
2 impairments: obesity and anxiety disorder. Tr. 20.

3 At step three, the ALJ found Plaintiff did not have an impairment or
4 combination of impairments that met or medically equaled the severity of one of
5 the listed impairments. Tr. 20-22.

6 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
7 she could perform light work with the following specific limitations:

8 The claimant is limited to simple, routine tasks and familiar, detailed
9 tasks. She would be precluded from highly detailed or highly complex
10 tasks. The claimant can have only superficial interaction with the
11 general public and co-workers but no requirement to frequently deal
12 with co-workers. She can interact with supervisors frequently.

13 Tr. 22.

14 At step four, the ALJ found Plaintiff unable to perform her past relevant
15 work as a child monitor, cashier, security guard, social service aide, childcare
16 attendant, or teacher aide. Tr. 25.

17 At step five, the ALJ found that, based on the testimony of the vocational
18 expert, and considering Plaintiff's age, education, work experience, and RFC, there
19 were jobs that existed in significant numbers in the national economy that Plaintiff
20 was capable of performing, including the jobs of production line solderer, electrical
21 accessories assembler, semi-conductor die loader, table worker, and cutter/paster.
22 Tr. 26-27.

23 The ALJ thus concluded Plaintiff was not under a disability within the
24 meaning of the Social Security Act at any time from the alleged onset date through
25 the date of the decision. Tr. 27.

26 ISSUES

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1 The question presented is whether substantial evidence supports the ALJ's
2 decision denying benefits and, if so, whether that decision is based on proper legal
3 standards.

4 Plaintiff contends the ALJ erred by (1) improperly rejecting medical opinion
5 evidence; (2) improperly rejecting Plaintiff's subjective complaints; (3) making
6 step five findings that did not account for all of Plaintiff's limitations; (4) failing to
7 find chronic pain, fibromyalgia, and ankle arthritis to be severe impairments; and
8 (5) failing to account for limitations in an opinion to which the ALJ assigned great
9 weight.

10 DISCUSSION

11 1. Step Two

12 Plaintiff argues the ALJ erred in failing to find fibromyalgia, chronic pain,
13 and arthritis to be severe impairments. ECF No. 11 at 2-6, 17-18.

14 At step two of the sequential evaluation process, the ALJ must determine
15 whether the claimant has any medically determinable severe impairments. 20
16 C.F.R. §§ 404.1520(a)(ii), 416.920(a)(ii). The impairment "must result from
17 anatomical, physiological, or psychological abnormalities that can be shown by
18 medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §§
19 404.1521, 416.921. An impairment is "not severe" if it does not "significantly
20 limit" the ability to conduct "basic work activities." 20 C.F.R. § 404.1522(a). "An
21 impairment or combination of impairments can be found not severe only if the
22 evidence establishes a slight abnormality that has no more than a minimal effect on
23 an individual's ability to work." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
24 1996) (internal quotation marks omitted). The claimant bears the burden of
25 demonstrating that an impairment is medically determinable and severe. *Valentine*
26 *v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). The step-two
27 analysis is "a de minimis screening device used to dispose of groundless claims."
28 *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

1 The ALJ found there was no objective evidence in the record to establish the
2 etiology of Plaintiff's alleged pain complaints, and noted that Plaintiff's pain
3 symptoms were generally well-controlled with treatment. Tr. 20. He thus found the
4 diagnoses of fibromyalgia, chronic pain syndrome, peripheral neuropathy, left
5 ankle sprain, and hypertension to be non-severe. *Id.*

6 Plaintiff argues the record contains objective signs of these conditions, and
7 asserts the necessary symptoms are present to establish fibromyalgia as a severe
8 condition. ECF No. 11 at 2-6, 17-18. She argues the ALJ selectively cited the
9 record, noting only times when she was doing better. *Id.* at 4-5. Defendant asserts
10 Plaintiff failed to identify any harmful error, as the ALJ still took into account the
11 non-severe impairments throughout the remainder of the decision. ECF No. 12 at
12 2-3. Defendant further argues Plaintiff failed to identify any functional limitations
13 that were not properly accounted for in the RFC, and that any error in not limiting
14 Plaintiff to sedentary work was harmless given the step five findings. *Id.* at 4.

15 The Court finds any error is harmless. Step two was resolved in Plaintiff's
16 favor, and Plaintiff fails to identify any credited limitation associated with the
17 identified conditions that was not considered by the ALJ and incorporated into the
18 RFC at step four. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055
19 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). The ALJ
20 limited Plaintiff to no more than light level work and found her capable of
21 performing both light and sedentary jobs at step five. Tr. 22, 26-27. The only
22 opinion Plaintiff identified in the record as containing greater limitations than those
23 in the RFC was Mr. Murrell's opinion limiting Plaintiff to sedentary work, which
24 would not have eliminated all the jobs found at step five. Therefore, any error in
25 not identifying these conditions as severe was harmless at most.

26 **2. Plaintiff's subjective statements**

27 Plaintiff alleges the ALJ improperly disregarded her subjective symptom
28 reports. ECF No. 11 at 15-16.

1 It is the province of the ALJ to make determinations regarding a claimant's
 2 subjective complaints. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
 3 However, the ALJ's findings must be supported by specific, cogent reasons.
 4 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
 5 produces medical evidence of an underlying medical impairment, the ALJ may not
 6 discredit testimony as to the severity of an impairment merely because it is
 7 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
 8 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting
 9 the claimant's testimony must be "specific, clear and convincing." *Smolen v.*
 10 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834
 11 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must identify
 12 what testimony is not credible and what evidence undermines the claimant's
 13 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
 14 1993).

15 The ALJ found Plaintiff's medically determinable impairments could
 16 reasonably be expected to cause some of the alleged symptoms; however, he found
 17 Plaintiff's statements concerning the intensity, persistence and limiting effects of
 18 her symptoms to be not entirely consistent with the medical evidence and other
 19 evidence in the record. Tr. 23. The ALJ found Plaintiff's allegations to be
 20 undermined by evidence showing her impairments were generally controlled by
 21 her medications, and he noted that the observations of Plaintiff in the record were
 22 unremarkable. Tr. 23-24.

23 Plaintiff argues the ALJ failed to identify what testimony was not credible or
 24 what evidence undermined it, and argues that none of the activities identified by
 25 the ALJ contradict Plaintiff's allegations.¹ ECF No. 11 at 15-16. Defendant argues
 26

27 ¹ The ALJ did not discount Plaintiff's subjective allegations based on her
 28 activities. Tr. 23-24.

1 the ALJ reasonably considered the record and offered clear and convincing reasons
2 for discounting Plaintiff's statements, and asserts Plaintiff has failed to specifically
3 challenge any of the given reasons. ECF No. 12 at 7-11.

4 The Court finds no error. In evaluating a claimant's reports, an ALJ may
5 consider "the type, dosage, effectiveness, and side effects of any medication an
6 individual takes or has taken to alleviate pain or other symptoms." Social Security
7 Ruling 16-3p. The ALJ noted multiple times in the record when Plaintiff reported
8 her symptoms were well-controlled with medication. Tr. 23-24. The Court finds
9 this is an accurate summary of the record, both regarding Plaintiff's mental health
10 and her pain symptoms. Tr. 576, 603, 670, 792, 1397 (pain is well-controlled,
11 tolerable, or stable); 667, 811, 1366, 1382, 1393 (doing well on current dosage);
12 579, 815, 843, 1390 (mental health medications help, control symptoms). The
13 times when Plaintiff reported increases in her pain tended to be in the context of
14 not taking her medications for various reasons or weaning off them too quickly. Tr.
15 625, 633, 655, 661, 673, 1371. The ALJ reasonably considered the relief Plaintiff
16 received from her treatment in assessing the reliability of her claims.

17 Although it cannot serve as the sole ground for rejecting a claimant's
18 symptom statements, objective medical evidence is a "relevant factor in
19 determining the severity of the claimant's pain and its disabling effects." *Rollins v.*
20 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The ALJ pointed to the generally
21 unremarkable physical and mental status exams throughout the record that fail to
22 support limitations to the extent alleged by Plaintiff. The ALJ's interpretation of
23 the record is reasonable, given the substantial number of times when exam findings
24 were normal. Tr. 480-81, 586, 766, 815, 846-47, 1368, 1373, 1381, 1385, 1387,
25 1393.

26 The Court therefore finds the ALJ offered clear and convincing reasons for
27 his assessment of Plaintiff's subjective reports.

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2 **3. Opinion evidence**

3 Plaintiff alleges the ALJ improperly weighed the opinion evidence. ECF No.
4 11 at 6-7, 12-15, 18-19. Specifically, she asserts the ALJ improperly rejected the
5 opinions from consultative examiner Dr. Thomas Genthe and treating PA-C Ben
6 Murrell, and failed to include all limits noted by state reviewer Dr. Renee
7 Eisenhower. *Id.*

8 *a. Examining source Dr. Thomas Genthe*

9 Plaintiff attended a consultative psychological exam with Dr. Thomas
10 Genthe in October 2014. Tr. 476-84. Dr. Genthe diagnosed Plaintiff with a panic
11 disorder with agoraphobia and a depressive disorder. Tr. 478. He opined Plaintiff
12 had mostly none to mild limitations in various areas of functioning, but found she
13 was markedly impaired in communicating and performing effectively in a work
14 setting, maintaining appropriate behavior in a work setting, and setting realistic
15 goals and planning independently, and found she was moderately impaired in her
16 ability to complete a normal work day and work week without interruptions from
17 psychologically based symptoms. Tr. 478-79.

18 When an examining physician's opinion is contradicted by another
19 physician, the ALJ may reject the opinion by providing "specific and legitimate
20 reasons," based on substantial evidence. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
21 Cir. 1995). The specific and legitimate standard can be met by the ALJ setting out
22 a detailed and thorough summary of the facts and conflicting clinical evidence,
23 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
24 F.2d 747, 751 (9th Cir. 1989). Dr. Genthe's opinion is contradicted by the opinion
25 from the state reviewing doctor. Tr. 267-69.

26 The ALJ gave this opinion some weight, but found it was not supported by
27 the record, particularly the findings of his own evaluation. Tr. 24-25.

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1 Plaintiff argues the ALJ failed to compare Dr. Genthe's opinion to that of
2 Dr. Eisenhower and consider the longitudinal similarity of limitations and findings.
3 ECF No. 11 at 13-15. Defendant argues the ALJ reasonably pointed to the normal
4 findings on Dr. Genthe's exam, and that the other records show mostly normal
5 mental status findings. ECF No. 12 at 13-14.

6 The lack of support and inconsistency with the record as a whole are specific
7 and legitimate reasons to discount the opinion from Dr. Genthe. 20 C.F.R. §§
8 404.1527(c)(3)-(4), 416.927(c)(3)-(4) ("The better an explanation a source
9 provides for an opinion, the more weight we will give that opinion."). Dr. Genthe's
10 exam results contain no abnormal findings, and Plaintiff reported her mood as
11 reasonably happy. Tr. 480-81. Dr. Genthe's report does not contain support for the
12 marked limitations assessed. As discussed above, the record contains largely
13 normal mental status exam findings. The ALJ's analysis is supported by substantial
14 evidence.

15 *b. Treating source Ben Murrell, PA-C*

16 Plaintiff's treating provider, Ben Murrell, PA-C, completed a form for the
17 Washington State Department of Social and Health Services in June 2016. Tr. 762-
18 64. He opined Plaintiff had marked limitations in all areas of functioning due to leg
19 and foot pain and anxiety, and moderate impairment due to nausea/vomiting. Tr.
20 763. He stated she was limited to sedentary work and recommended temporary
21 disability while further treatment and evaluation were pursued. Tr. 764.

22 The ALJ gave this opinion little weight, noting that Mr. Murrell had only
23 examined Plaintiff on one occasion and the accompanying treatment notes of the
24 visit did not reveal any limitations. Tr. 24. He further noted the general record did
25 not contain objective findings to support Plaintiff's pain complaints. *Id.*

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1 An ALJ may discount the opinion of an “other source,” such as a nurse
2 practitioner, if he provides “reasons germane to each witness for doing so.” *Molina*
3 *v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).²

4 Plaintiff argues that substantial evidence does not support the ALJ’s
5 interpretation of the record as showing improved or normal findings, as her
6 fibromyalgia waxes and wanes. ECF No. 11 at 13. Defendant asserts the ALJ
7 offered germane reasons for discounting Mr. Murrell’s opinion, and notes Plaintiff
8 failed to challenge all of the reasons offered by the ALJ. ECF No. 12 at 12-13.
9 Defendant further notes that Mr. Murrell did not base his opinion on a
10 fibromyalgia diagnosis. *Id.* at 12.

11 The Court finds the ALJ offered germane reasons for assigning little weight
12 to Mr. Murrell’s opinion. The consistency of a medical opinion with the record as a
13 whole is a germane factor for an ALJ to consider in evaluating the weight due to an
14 “other source,” along with the nature of the treatment relationship and the amount
15 of relevant evidence supporting the opinion. 20 C.F.R. §§ 416.927(c)(2)(4),
16 416.927(f). The ALJ reasonably considered the fact that Mr. Murrell had only seen
17 Plaintiff on one occasion and the accompanying records from that visit did not
18 document any objective findings of limitations. Tr. 765-66.

19 Furthermore, as the ALJ identified sedentary jobs at step five, any potential
20 error in the ALJ’s rejection of Mr. Murrell’s opinion is harmless. *Tommasetti v.*
21 *Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is harmless when “it is clear
22 from the record that the . . . error was inconsequential to the ultimate nondisability
23 determination”).

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26 ² Plaintiff cites to law regarding treating physicians. ECF No. 11 at 12-13.
27 Mr. Murrell is a physician’s assistant, which is not an acceptable source under the
28 rules governing this claim. *See* 20 C.F.R. § 404.1502(a)(8).

1 *c. Reviewing source Dr. Renee Eisenhauer*

2 At the reconsideration stage of adjudication, Plaintiff's file was reviewed by
3 Dr. Renee Eisenhauer. Tr. 267-69. Dr. Eisenhauer opined Plaintiff was cognitively
4 capable of simple routine tasks and complex and detailed tasks on a regular and
5 routine basis, and that even though her physical/somatic concerns would impair her
6 concentration, persistence, and pace occasionally, she was still capable of
7 maintaining concentration for two hour intervals. Tr. 268. Dr. Eisenhauer further
8 stated Plaintiff was best suited for superficial contact with coworkers and the
9 public and could have moderate contact with supervisors to remain on task. Tr.
10 268-69. The ALJ gave this opinion great weight and found it consistent with the
11 findings and observations throughout the record. Tr. 25.

12 Plaintiff asserts the ALJ erred in failing to account for or give any reason for
13 rejecting the various moderate limitations Dr. Eisenhauer noted, including on the
14 ability to maintain attention and concentration for extended periods, perform
15 activities within a schedule, maintain regular attendance, be punctual within
16 customary tolerances, work in coordination with or in proximity to others, and
17 complete a normal workday and workweek without interruptions from
18 psychologically based symptoms. ECF No. 11 at 6-7, 18-19.

19 The Court finds no error. The form completed by Dr. Eisenhauer contains
20 ratings in various categories then requested the doctor "Explain in narrative form"
21 the degree of specific capacities or limitations. Tr. 268-69. These narrative portions
22 specify the actual functional limitations Dr. Eisenhauer found stemmed from the
23 various moderate limitations she assessed. The ALJ accounted for all concrete
24 limitations offered.

25 **4. Step five**

26 Plaintiff argues that the step five findings are insufficient, as the hypothetical
27 posed to the vocational expert failed to account for all of Plaintiff's limitations.
28 ECF No. 11 at 16-17. Plaintiff's argument is based on successfully showing that

1 the ALJ erred in his treatment of the evidence. *Id.* Because the Court finds that the
2 ALJ did not harmfully err in his treatment of Plaintiff's symptom statements and
3 the medical opinion evidence, Plaintiff's argument is without merit.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's findings, the Court finds the
6 ALJ's decision is supported by substantial evidence and free of legal error and is
7 affirmed. Therefore, **IT IS HEREBY ORDERED:**

8 1. Defendant's Motion for Summary Judgment, **ECF No. 12**, is
9 **GRANTED.**

10 2. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED.**

11 The District Court Executive is directed to file this Order and provide a copy
12 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
13 and the file shall be **CLOSED.**

14 **IT IS SO ORDERED.**

15 DATED November 10, 2020.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE